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SUPREME COURT, U.S.

No. 07-1333

IN THE SUPREME COURT OF THE UNITED STATES

TSG WATER RESOURCES, INC., et al.,

Petitioners,

v.

D'ALBA & DONOVAN CERTIFIED PUBLIC ACCOUNTANTS, P.C.,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1.

Should the Supreme Court review an issue neither briefed nor argued in the lower courts with no importance beyond the parties themselves?

2.

Is a fact-intensive determination limited to Georgia tort and securities law an appropriate subject for Supreme Court review, where the decision addressed no federal law?

3.

Should the Supreme Court review the Eleventh Circuit's refusal to declare an exculpatory provision as against Georgia public policy where that decision turned only on Georgia contract law?

PARTIES TO THE PROCEEDING

Petitioners are TSG Water Resources, Inc.; TSG Technologies, Inc.; Donald L. Mayer; Paul S. Steward; Jonathan D. Sprague; Robert M. Bolz; John A. Bolz; William Roger Holden; and OGM Family Limited Partnership. TSG Water Resources, Inc. and its wholly-owned subsidiary, TSG Technologies, Inc., are two corporations engaged in the business of designing and constructing wastewater facilities and desalinization plants primarily for municipalities, hotels and resorts in the southeastern U.S. and Caribbean. TSG Water Resources, Inc. retained Respondent to audit the year 2000 financial statement for it and TSG Technologies, Inc. Petitioners Donald Mayer, Jonathan Sprague and Paul Steward were directors of and investors in TSG Water Resources, Inc. Petitioners Robert Bolz, John Bolz, William Holden, and OGM Family Limited Partnership were investors in TSG Water Resources, Inc. All of the Petitioners were plaintiffs in the District Court and Appellants in the Court of Appeals.

Respondent is D'Alba & Donovan Certified Public Accountants, P.C. Respondent was a defendant in the District Court and an Appellee in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, there is no parent or publicly held company owning 10% or more of Respondent D'Alba & Donovan Certified Public Accountants, P.C.'s stock.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent D'Alba & Donovan Certified Public Accountants, P.C. ("D&D") respectfully asks that this Court deny the Petition for Writ of Certiorari ("Petition") submitted by Petitioners TSG Water Resources, Inc.("TSG").[1]

COUNTER-STATEMENT OF THE CASE

For years, Petitioners TSG lost hundreds of thousands of dollars due to high overhead and low sales. The company's year 2000 financial statements showed a loss before taxes and a modest net income of

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[1] Throughout this brief, the entire group of Petitioners is referred to as either "TSG" or "Petitioners." When TSG Water Resources, Inc. and TSG Tech need to be distinguished from the remaining Petitioners, they are identified as the "TSG corporations." The investors who originally filed suit against the Respondent, including Donald L. Mayer, Paul S. Steward, Jonathan D. Sprague, Robert M. Bolz, John A. Bolz, William Roger Holden, and the OGM Family Limited Partnership are also referred to as "TSG." When the investors must be distinguished from the TSG corporations, however, they will be referred to as the "investor Petitioners."

$68,926. TSG depended on insider loans to offset its consistent losses. As projects dried up and payables mounted, TSG nearly went under in the summer of 2001.

At a crucial board meeting called to avert this disaster, the directors did not review the year 2000 audited financial statements but focused instead on "the existing and future situation." Although TSG was about to go out of business and projected negative cash flow under the best case scenario, the directors claim they thought TSG had "turned the corner," that TSG's business model was valid, and that the cash crunch was temporary. They insist that, had they known better, they would have fired former president and majority shareholder Jim Walker, who reportedly caused TSG to incur excessive expenses. TSG claim the accountants are responsible for Walker's exorbitant spending.

D&D began its audit fieldwork in March 2001. At this point, TSG's internal financial records showed net income for the year 2000 was approximately $38,000, a little less than the net income management eventually reported on the financial statements. D&D released its audit report on April 27, 2001, six weeks before TSG

began soliciting loans from the investor Petitioners. The company itself did not contemplate borrowing money from the investor Petitioners until June 2001. As D&D did not even know about the loans, it obviously did not issue its audit report to induce the investor Petitioners to loan money.

TSG Water, one of its subsidiaries called TSG Technologies, Inc., and some shareholders sued the corporations' chief financial officer, Morris Bencini,[2] and D&D as outside auditor. Petitioners originally filed suit in the State Court of Chatham County, Georgia, claiming the year 2000 financial statements overstated the companies' net income.

D&D and Bencini removed the action to the United States District Court for the Southern District of Georgia, Savannah Division under 28 U.S.C. § 1332. The

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[2] Morris Bencini is a former chief financial officer of TSG and was originally a defendant in this action. The District Court granted summary judgment in Bencini's favor on all claims. On appeal, the Eleventh Circuit vacated and remanded the dismissal of Petitioners' claims with respect to Bencini. Bencini's remand proceedings have not yet gone to trial.

District Court granted summary judgment to D&D on all claims except the TSG corporations' claims for malpractice and breach of contract. The District Court also denied TSG's motion to remand, concluding that TSG Technologies, Inc.'s principal place of business was in Georgia and, therefore, that diversity jurisdiction was proper.

TSG's negligence and breach of contract claims proceeded to trial. A jury awarded the TSG corporations a fraction of the damages they sought. The District Court then granted a post-trial judgment as a matter of law, holding that a contractual clause precluding consequential damages barred the TSG corporations' claims for the excessive expenses and interest on shareholder loans. The District Court also denied Petitioners' motions for attorney's fees and pre-judgment interest. Petitioners then appealed to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit affirmed the District Court's determination that Georgia was TSG's principal place of business. The Court also held that TSG's fraud and securities fraud claims against D&D were properly dismissed, concluding that their reliance on the year 2000 audit report was

not justified as a matter of law. Finally, the Eleventh Circuit held that the exculpatory provision in the engagement letter between D&D and TSG was valid, enforceable, and not contrary to public policy. TSG petitioned for a rehearing which was denied and then filed a motion to stay the mandate pending their petition for certiorari. This motion was also denied based on the poor prospects of TSG securing Supreme Court review. TSG have finally offered this Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

This Court should deny certiorari because:

- The sole federal issue was neither argued nor ruled on below. The lower courts never decided what test determines a corporation's principal place of business. The parties never briefed that issue. Whether TSG Technologies, Inc. has its principal place of business in Florida is a fact-intensive question of interest to the parties only and not to the general public.

- The lower courts relied solely on Georgia law to decide the enforceability of the consequential damages clause and the reasonableness of the investors' reliance. Thus, questions 2 and 3 do not embrace any issue of federal law and, therefore, do not warrant a grant of certiorari.

I. This Court has no Jurisdiction to Review a Federal Issue Neither Argued nor Decided Below.

After more than five years of litigation, TSG claim for the first time that the courts of the Eleventh Circuit have applied an inappropriate legal framework to determine a corporation's principal place of business. Petitioners never raised the issue of what test should apply in the lower courts. Rather, they argued that certain factors should be given more weight than others within the "total activities" test. This is an entirely distinct issue from the one they now present for Supreme Court review. The Supreme Court does not ordinarily review claims not raised or resolved in the lower courts, and it should not do so in this case. *See, e.g. Taylor v. Freeland & Kronz,* 503 U.S. 638, 645-46 (1992).

The question of what test to apply never came up below. As their opinions indicate, the lower courts neither analyzed nor chose among competing tests. The lower courts simply applied the Eleventh Circuit's "total activities" test. Petitioners never argued for a different test. They therefore waived any argument that the lower courts applied the wrong test. The lower courts issued their judgments without the benefit of any briefing on what test to apply. As this issue was neither briefed nor analyzed below, this Court should not review it.

II. The Eleventh Circuit's Determination of TSG's Principal Place of Business Is Fact-Specific and Thus Not an Important Federal Question Worthy of Review.

Supreme Court Rule 10 sets forth the criteria guiding the decision to grant certiorari. Under Rule 10, the Court should grant certiorari "only for compelling reasons." The Rule clarifies what specifically makes an issue "compelling" enough to warrant Supreme Court review. The Court should consider whether the decision presented for review concerns an important, unsettled federal question and whether it creates a conflict between courts. *See* Sup. Ct. R. 10. Far from involving an "important federal questions," the issue of TSG's citizenship has no importance beyond the parties' themselves.

The determination of TSG's principal place of business was based on the application of well-settled criteria to the Petitioners' particular circumstances. It is not the Supreme Court's role to review such fact-bound conclusions. *Packwood v. Senate Comm. on Ethics*, 510 U.S. 1319, 1321 (1993) (finding grant of certiorari unlikely where

question involved fact-bound determination); *see also Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)(cautioning that "it is very important that we [the Supreme Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties. . .").

The Supreme Court does not and should not intervene anytime there exists variation amongst the Circuits. Rather, certiorari should only be granted where the Circuits conflict on "an important matter." S. Ct. R. 10. In attempting to manufacture a question worthy of certiorari, TSG has overlooked this point. While there exists no singular test for evaluating a corporation's principal place of business, the Circuits have developed settled, predictable standards for resolving this issue. It is, then, not surprising that the Supreme Court declined to review this very question more than fifteen year ago. *See Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57 (1st Cir. 1993), *cert. denied, Desarollos Metropolitanos, Inc. v. Taber Partners I,* 510 U.S. 823 (1993). TSG's petition should fare no better.

III. The Eleventh Circuit Correctly Held That Georgia Was TSG Technologies, Inc.'s Principal Place of Business.

Notwithstanding Petitioners' reliance on a relatively trivial variance between the circuits, they cannot escape the soundness of the Eleventh Circuit's conclusion as to TSG Technologies, Inc's citizenship. The record was replete with factors supporting the Eleventh Circuit's decision:

> TSG Tech's corporate records, banking records, accounting records, and original contracts are maintained at the Savannah, Georgia headquarters of its parent company, TSG Water. TSG Water directs the activities of TSG Tech and other subsidiaries from the Georgia headquarters. The decision-makers for TSG Tech, including its directors and two of its officers, are also located in Georgia. Only one of the four officers is located in Florida, and the TSG Tech board of directors has never met in Florida. The payroll, insurance, and accounts payable for TSG Tech are controlled and directed by the Georgia office, which also prepares financial statements and invoices. The accounting and legal professionals used

> by TSG Tech are also located in Georgia. Additionally, TSG Tech's primary operating bank account is located in Georgia and all signatories to the account are persons located in Georgia. 260 Fed. Appx. 191 at 196.

As an initial matter, the Supreme Court is not a court of error. *See* S. Ct. R. 10 (noting that "writs are rarely granted when the asserted error consists of the misapplication of a properly stated rule of law."). Even if it were, the Eleventh Circuit committed no errors worthy of review. Its conclusions were reasonable and based on the painstaking application of settled law to the particular facts of this case. Thus, Petitioners fall short of warranting certiorari both because they present inappropriate subject matter and because they cannot point to a single error justifying Supreme Court intervention.

IV. This Court Should Not Address Issues Limited Solely to State Law.

TSG's Petition raises issues that are manifestly inappropriate for Supreme Court review. While certiorari is reserved for important federal issues, TSG seek to foist upon the Court issues with no federal

relevance whatsoever. *See* S. Ct. R. 10. Question two – whether the investors reasonably relied on the audit report – merely addresses the Eleventh Circuit's application of state tort law and securities statutes. Likewise, question three – whether the consequential damages clause violates Georgia public policy – is a matter of state contract law.[3]

Thus, two-thirds of the Petition is patently improper subject matter for a writ of certiorari. No amount of imaginative phrasing can transform party-specific state law issues into the "important federal questions" warranting the time and resources of the Supreme Court.

Conclusion

For all the reasons set forth above, and because Petitioners can show no

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[3] To the extent TSG argues that the Eleventh Circuit should have certified this question, the Respondent notes that TSG never moved for certification of this question and that the certification of state law questions is not obligatory but rests in the sound discretion of the federal court. *See Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974).

compelling reason for reviewing the Eleventh Circuit's fact-specific, reasonable, and state law-focused decision, TSG's Petition for Writ of Certiorari should be denied.

Respectfully submitted this 23rd day of May, 2008,

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Applications for Admission Pending

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